***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S BRIEF

# 74-1603

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

-against-

WINCEL HENDRIX,

Appellant.

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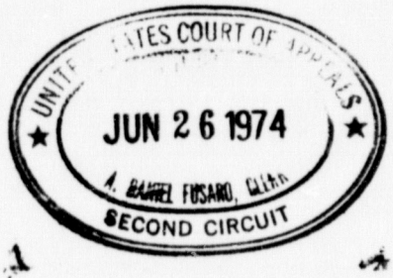
Docket No. 74-1603

## BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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# BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

## QUESTIONS PRESENTED

1. Whether the sentencing judge acted improperly in adding two years to appellant Hendrix's sentence as punishment for what the judge concluded to have been Mr. Hendrix's perjury at trial.

2. Whether the trial judge demonstrated his prejudice against the defense case and imposed an unfair burden on a defense witness by ordering her to prove what she had attested to.

## STATEMENT PURSUANT TO RULE 28(3)

### Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Eastern District of New York (The Honorable Jacob Mishler) rendered May 3, 1974, after a jury trial, convicting appellant of one count of possession with intent to distribute cocaine and one count of possession with intent to distribute marijuana, both in violation of 21 U.S.C. §841(a)(1). Appellant was sentenced to ten years' imprisonment and a special parole term of five years under count one, and five years' imprisonment and a special parole term of five years under count two, the sentences to run concurrently. The court stated that two years of this sentence were imposed for perjury committed during trial.

The Legal Aid Society was continued as counsel on appeal pursuant to the Criminal Justice Act.

### Statement of Facts

Prior to trial appellant Hendrix sought to have suppressed certain evidence on the ground that the search warrant which led to that evidence was invalid. The motion was denied (March 12, 1974:3).* The court proceeded to dismiss count three of the indictment on the Government's mo-

*Dates and numerals in parentheses refer to dates and pages of the trial transcript.

tion (March 12, 1974:12). A hearing was then held on Hendrix's motion to suppress certain statements alleged to have been made by him shortly after his arrest. Rex Henderson, a special agent for the Drug Enforcement Administration, described an interview he had witnessed between Hendrix and Assistant United States Attorney Vivianni on June 23, 1973. According to Henderson, during this interview, when Vivianni stated to Hendrix:

> You were found with a large quantity of coke in your house, or cocaine, something in the area of three quarters of a kilo,

Hendrix responded:

> No, I think it was more like a half.
>
> (March 12, 1974:23).

The court held that this statement was admissible.

George McAndrews, a sergeant with the New York City Police Department, then testified concerning a second challenged statement. According to McAndrews, he arrested Hendrix on June 22, 1973, on the corner of 94th Street and Ditmars Avenue in Queens. McAndrews testified that although he advised Hendrix at that time of some of his Miranda rights, he did not advise Hendrix of his right to have an attorney appointed if Hendrix could not afford one. McAndrews then took Hendrix five and one-half blocks to Hendrix's home, which was already being searched by agents pursuant to a search warrant. During the search, Hendrix was held in

a basement room. At one point, one of the agents involved in the search entered that room and announced that they had discovered approximately a half kilo of cocaine in a closet in the master bedroom (March 12, 1974:47). McAndrews then proceeded with Hendrix to the stairway. While passing through a mirrored playroom, McAndrews asked Hendrix, "Is it necessary to take the mirrors down?" Hendrix allegedly responded, "No." When McAndrews asked, "Why?", Hendrix stated, "They have everything. There is nothing behind the mirrors. It cost a lot of money to put them up. He doesn't have to rip them down" (March 12, 1974:48).

The court held that this constituted an in-custody interrogation, and that since full Miranda warnings were lacking, Hendrix's statements could not be attested to at trial. At that moment, Assistant United States Attorney Scotti conferred with McAndrews and returned him to the stand. McAndrews then revised his testimony, claiming now that Hendrix's statement was spontaneous (March 12, 1974:55). The court adhered to the ruling that the statements were inadmissible (March 12, 1974:56).

The jury was then seated, and the Assistant United States Attorney made an opening statement in which he informed the jury that he was confident the jury would be more than justified in finding the defendant guilty of the crimes charged (March 12, 1974:60-61).

The Government's first witness was Fred Martorell,

a chemist for the Drug Enforcement Administration, who identified various government exhibits as containing cocaine, marijuana, hashish, manite, and quinine (March 12, 1974:72-96). During his examination of this witness, the prosecutor, having established that cocaine was sometimes mixed with manite, then elicited from the chemist the fact that cocaine was also mixed with heroin (March 12, 1974:98). Mr. Hendrix was not charged in this case with any crime involving heroin.

McAndrews, the next witness, again described his arrest of Hendrix. He stated that approximately $700 was found in Hendrix's pocket at the time of his arrest (March 12, 1974:122). McAndrews also testified that prior to his arrest Hendrix was observed entering a cab with a brown paper bag in his hand. According to McAndrews, a brown paper bag containing manite was found in the taxi following Hendrix's arrest. Hendrix denied ownership of this bag (March 12, 1974:116). Assistant United States Attorney Scotti repeatedly questioned McAndrews concerning the color of this bag:

> Q. Is it possible that the bag might have been a different color than brown?
>
> A. No, I don't believe so.
>
> Q. Could it have been green?
>
> A. No.
>
> Q. You are positive about

that?

Q. Positive.

THE COURT: The answer is yes?

THE WITNESS: Yes, positive.

(March 12, 1974:120).

The court then directed a recess during which the prosecutor talked to the witness concerning the color of the bag. When he returned to the stand, the witness compliantly retracted his earlier "positive" testimony that the bag was brown, saying rather that he now remembered that the bag was indeed green (March 12, 1974:122).

Rex Henderson testified next for the Government. During his testimony, the money seized from Hendrix at the time of his arrest was marked into evidence. The prosecutor then distributed this money among the jurors for their examination.

Henderson also described various items which were found in Mr. Hendrix's home, including two shopping bags containing cocaine, marijuana, hashish, and manite, found in the closet of the master bedroom; scales and a measuring pan found on the bedside table; a grey suitcase containing manite, lactose, two strainers, one measuring spoon, aluminum foil, and half a $10-bill; a metal box containing cartridges, a holster, and approximately $3,000; cocaine found in a jewelry box on the dressing table; and marijuana found

in the kitchen and the lower front bedroom of the house (March 12, 1974:135-54; March 13, 1974:3-34). Henderson also testified that while the agents were searching Hendrix's house approximately nineteen to twenty persons, including Hendrix's wife, arrived at the premises (March 13, 1974:8).

The Government's next witness, Detective Ryan of the New York City Police Department, testified that later that evening Hendrix was again searched, at which time a tinfoil packet containing cocaine and six marijuana cigarettes was found in his shirt pocket (March 13, 1974:65-68).

After the Government rested and the defendant's motion for a judgment of acquittal was denied, Hendrix took the witness stand in his own behalf. He testified that numerous other persons besides himself lived in the house and used rooms in which evidence was found, including a cousin who was presently enrolled in a drug program (March 13, 1974:73-75). He testified that he had no knowledge of the drugs and other items found in the house, and that he did not have any drugs on his person when arrested (March 13, 1974:79-80). He claimed, rather, that an agent must have planted the cocaine and marijuana citarettes on him (March 13, 1974:80).

Hendrix also testified that at the time of his arrest he was taking some manite to a friend who lived near the garage where Hendrix worked. Manite is a baby laxative and, according to Hendrix, his friend had children who would

use it for that purpose (March 13, 1974:77). Hendrix also testified that the $3,000 found in the master bedroom was money sent to his wife by her brother. According to Hendrix, his wife's brother owned a clothing store in Atlanta and would periodically send money to Hendrix's wife so that she could purchase goods in New York to be sold in that store (March 13, 1974:78).

On cross-examination, Hendrix denied making the statements which were the subject of the suppression hearing (March 13, 1974:99, 117). He testified that during the prior sixteen or seventeen years, he had worked as a garage man or parking attendant. He further testified that in 1972 he had purchased a $64,000 house in Queens, paying a down-payment of $36,000 (March 13, 1974:121), and that between 1966 and 1972 he had purchased a Cadillac every two years (March 13, 1974:124-25). Hendrix also testified that on his income tax returns he reported a gross annual income of between $6,000 and $8,000 for each year between 1966 and 1971 (March 13, 1974:132-36).

Novella Hendrix, appellant's wife, also took the stand in his behalf. She corroborated his testimony that the approximately $3,000 found by the agents had been sent to her by her brother for the purpose of purchasing goods for his Atlanta store (March 13, 1974:147-48). Mrs. Hendrix also testified that she had hit on the numbers, winning $12,000 which, together with $10,000 borrowed from their

family and friends and money they had in savings, made up the down payment for the house they bought in 1972 (March 13, 1974:145-46).

On cross-examination, while the Government was inquiring as to the purchase of Hendrix house, Mrs. Hendrix was ordered by the judge to produce the deed to her house. She complied by producing the deed (March 13, 1974:152).

Also on cross-examination, the prosecutor engaged in lengthy questioning concerning Mrs. Hendrix's activities as a purchaser of goods for her brother's store. This examination included repeated demands for the names and locations of specific stores where Mrs. Hendrix had purchased such goods in the past. After Mrs. Hendrix testified that she could not recall the names of the stores, the following questioning took place:

> Q. You don't remember the nam of any of these stores?
>
> A. No, but I can get them.
>
> Q. How can you get them?
>
> A. I have to call my brother.
>
> Q. Your brother has them?
>
> A. I send the bills to him.
>
> (March 13, 1974:167).

At this point, the court first asked Mrs. Hendrix if she would like to call her brother, and then directed her to do so despite her stated belief that the store was not open

on that particular day (March 13, 1974:167-68).

After the jury was excused, the court further ordered the witness:

> You are directed to call your brother and make sure you make calls to get him. I'm making a direction, you step down, you call him wherever he might be. You may step down and then I'll permit cross-examination.
>
> THE WITNESS: I'll step down but I can't call him, the store is not open today, your Honor.
>
> THE COURT: I think it's outrageous when a witness can say anything believing that the Government cannot -- doesn't have the time to check it out.
>
> [DEFENSE COUNSEL]: I would respectfully place my objection on the record that your Honor's inference --
>
> THE COURT: She volunteered the information to the Jury that she could get the information by calling her brother, that was her statement. She has the books but she didn't see it since the officers came in and made the search on the 22nd. Now these were gratuitous made for a specific purpose.
>
> [DEFENSE COUNSEL]: I haven't coached my witness.
>
> THE COURT: I don't say you did.
>
> [DEFENSE COUNSEL]: Early this morning and late this after-

noon --

THE COURT: When she indicates I could call my brother and get the information the answer is -- step down and call your brother. You made your objection on the record. That's the direction and if necessary you make the call for her it'll be at the government's expense. Call her brother no matter where he is.

[DEFENSE COUNSEL]: I have to go over to the other office.

THE COURT: You have the privacy of my office. Let's not waist [sic] time. Gratuitous statements made to place the government in a position where he cannot get the information. I think the answer to all that is that if you say you can corroborate it someplace, corroborate it. You have the time to do it now do it. Bring the Grand Jury up.

(Whereupon a recess was had.)

(After recess.)

THE COURT: Mrs. Hendrix, you are a witness under cross-examination, you are directed to answer the questions put to you and nothing else. If you volunteer information as you have in the past, like I have the the deed and I can tell you, I asked you to go down and get the deed and the next was I would know the name of the stores but I have the book and the last one was Oh, I don't know the name but if I called my brother he would tell me. This is volunteering information. I'll direct you to go down and get the in-

formation. Do we understand each other?

[DEFENSE COUNSEL]: May I just state for the record that Mrs. Hendrix did place a long distance call to her brother and at that time was informed that her brother was not present. I would like to note my objection that the defendant be required to produce evidence in the manner in which your Honor has --

THE COURT: This isn't asking the defendant to produce evidence to show his innocence.

[DEFENSE COUNSEL]: Requiring to produce evidence that is not available.

[THE PROSECUTOR]: The defendant volunteered.

THE COURT: That's just the point, gratuitous information done for a particular purpose. She may not be a seasoned witness, she knows just what she's doing. Seat the jury.

(March 13, 1974:168-70).

In rebuttal, the court permitted government agents to testify to the statements allegedly made by appellant while his house was being searched and in the interrogation by Asstant United States Attorney Vivianni.

After summations by both sides and the judge's charge, the jury deliberated and returned with a verdict of guilty on both counts.

After the verdict was entered, the judge alluded

to what he felt was the "defendant's contempt for the court processes," and said that he hoped the Government had seized all of Hendrix's money (March 14, 1974:77). The judge also implied that he believed Hendrix had committed perjury when he testified in his own behalf (March 14, 1974:78).

At sentencing, the judge stated that he was "convinced beyond a reasonable doubt" that Hendrix and his wife perjured themselves at trial. He then stated that he had added two years to Hendrix's sentence for perjury (May 3, 1974:5-6). Hendrix was then sentenced to ten years' incarceration and a special parole term of five years on count one, and five years' incarceration and a special parole term of five years on count two, the sentences to run concurrently.

## ARGUMENT

### I

**THE SENTENCING JUDGE ACTED IMPROPERLY IN ADDING TWO YEARS TO APPELLANT HENDRIX'S SENTENCE AS PUNISHMENT FOR WHAT THE JUDGE CONCLUDED TO HAVE BEEN MR. HENDRIX'S PERJURY AT TRIAL.**

Both Mr. Hendrix and his wife testified as witnesses for the defense at the trial below. At sentencing, the trial judge stated:

> ... I'm convinced beyond a reasonable doubt that [Mr. Hendrix] and his wife perjured themselves on the stand when they took the stand before me on trial.
>
> (May 3, 1974:5).

The judge then stated that he had added two years on to Mr. Hendrix's sentence for his "perjury during the trial." In so doing, the judge acted unconstitutionally and in abuse of his sentencing discretion.

Three arguments are commonly advanced by those who advocate that increasing a defendant's sentence because he is believed to have committed perjury at his trial is proper: that the additional sentence is punishment for the additional substantive crime of perjury; that the additional sentence is punishment for what the trial judge perceives as contempt of court implicit in the defendant's alleged perjury; or that the alleged perjury reflects adversely on the defendant's

prospects for rehabilitation, thereby justifying a higher sentence.

The record in this case clearly establishes that the trial judge imposed the additional two-year sentence as an additional punishment either for the substantive crime of perjury or for contempt of court rather than because the judge felt the alleged perjury reflected adversely on Mr. Hendrix's prospects for rehabilitation.* However, increasing Mr. Hendrix's sentence for any of these three reasons was clearly erroneous.

If the additional two-year term was imposed as

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*Immediately after the jury returned with its guilty verdict, the trial judge alluded to "the defendant's contempt for the court processes," stating that he "place[d] the full blame on the defendant" for what the judge believed was the defendant's perjury at trial (March 14, 1974:77-78). At the subsequent sentencing proceeding, the trial judge referred back to these remarks and, using the phraseology of a formal finding of fact, stated that he was convinced "beyond a reasonable doubt" that Mr. Hendrix and his wife had "perjured" themselves when they testified at trial (May 3, 1974:5). Then, immediately before announcing that he was adding two years to Mr. Hendrix's sentence for perjury, the judge stated:

> ... I think defendants should be encouraged to take the witness stand but when they take the witness stand I think they must understand that there is a certain risk they take, they better tell the truth.
>
> (May 3, 1974:6).

By these statements, the trial judge clearly indicated that the two-year increase in Mr. Hendrix's sentence was being imposed as punishment for Mr. Hendrix's alleged perjury rather than out of concern that such perjurious conduct reflected adversely on his prospects for rehabilitation.

punishment for the substantive crime of perjury, it was indisputably violative of constitutional requrements and basic tenets of criminal law. Scott v. United States, 419 F.2d 264, 268-69 (D.C. Cir. 1969); Note, The Influence of the Defendant's Plea on Judicial Determination of Sentence (hereinafter referred to as "Sentencing"), 66 Yale L.J. 204, 211-17 (1956). Any perjury believed to have been committed by a defendant during his trial is properly punishable as a separate criminal proceeding. United States v. Williams, 341 U.S. 58 (1951); 18 U.S.C. §1621. Consequently, the summary determination by the trial judge in this case that Mr. Hendrix was guilty of this crime constituted a denial of Mr. Hendrix's Sixth Amendment right not to be deprived of his liberty without due process of law, and of the other constitutional safeguards of the criminal process, including an indictment and a trial with a jury. Mr. Hendrix was entitled to these guaranteed rights before he could be lawfully convicted and sentenced for the crime of perjury. Scott v. United States, supra, 419 F.2d at 365; Sentencing, supra, 66 Yale L.J. at 212-13). Moreover, given the fact that Mr. Hendrix's conviction in this case for narcotics violations would be inadmissible evidence in a subsequent trial for perjury (Sentencing, supra, 66 Yale L.J. at 213; Wharton, EVIDENCE IN CRIMINAL ISSUES, §602(a) (8th ed. 1880); see also United States v. Burkhardt, 31 Fed. 141 (C.C.Ore. 1887); Starnes v. State, 125 Tex. Crim. 21, 66 S.W.2d 335 (1933).

It was wholly improper for the trial judge to presume conclusively that Mr. Hendrix had committed perjury merely because the jury convicted him in this case. Sentencing, supra, 66 Yale L.J. at 213; see also Developments in the Law -- Res Judicata, 65 Harv. L. Rev. 818, 877 n.441 (1952).

The two-year increase in Mr. Hendrix's sentence was similarly improper if imposed as punishment for contempt of court which the judge felt was implicit in Mr. Hendrix's alleged perjury. The Supreme Court has repeatedly held that perjury, by itself, does not "obstruct the administration of justice," and hence does not constitute criminal contempt under the applicable federal statute. In re Michael, 326 U.S. 224 (1945); Ex Parte Hudgings, 249 U.S. 378 (1919); Sentencing, supra, 66 Yale L.J. at 213-14. Even if perjury were punishable as contempt, it would require due notice and a hearing (Sentencing, supra, 66 Yale L.J. at 214; see also United States v. Wilson, 487 F.2d 1231 (2d Cir. 1973), cert. granted, ___ U.S. ___ (1974). Moreover, the trial court, in punishing Mr. Hendrix for his alleged perjury by increasing the sentence for the crime charged rather than complying with the standard procedures for punishment for contempt, denied Mr. Hendrix his right to appeal from such a contempt determination. In re Merchants' Stock & Grain Co., 223 U.S. 639, 642 (1912); In re Manufacturers Trading Corp., 194 F.2d 948, 955 (6th Cir. 1952); Sentencing, supra, 66 Yale L.J. at 214-15.

Finally, the theory that a defendant who is believed to have committed perjury in his own defense is somehow less amenable to rehabilitation, thereby justifying the imposition of a higher sentence, is invalid. The court in Scott v. United States, supra, rejected this rationale for increasing a convicted defendant's sentence. The court reasoned first that a defendant's commission of perjury at his own trial provides no reliable basis for concluding that defendant is less amenable to rehabilitation than others who have been convicted of the same crime:

> ... It is indeed unlikely that many men who commit a serious crime would balk on principle from lying in their own defense.
>
> . . . .
>
> ... [A] defendant threatened with jail and the stigma of conviction ... may quite sincerely repent his crime but yet ... protest his innocence in a court of law.
>
> (Id., at 269).

Moreover, in the "usual" case where a defendant pleads guilty, he "is motivated to admit guilt not by an aversion to perjury but by the realization that his plea may be effective in mitigating sentence." Sentencing, supra, 66 Yale L.J. at 217; Newman, Pleading Guilty for Consideration: A Study of Bargain Justice, 46 Crim. L., C. & P.S. 780, 783-84 (1956); see also In re Smith, 162 Ohio St. 58, 120 N.E.2d 736 (1954); Maxwell v. State, 292 P.2d 181 (Okla. Crim. App. 1956); Com-

monwealth v. Cole, 384 Pa. 40, 119 A.2d 253 (1956); Hobson v. Youell, 177 Va. 906, 914-15, 15 S.E.2d 76, 79 (1941). There is no reason for believing that such a defendant is more amenable to rehabilitation, and therefore more deserving of a lesser sentence than the defendant who pleads not guilty:

> ... When perjury is avoided for reasons of expediency, not principle, it is debatable whether the defendant pleading guilty is a better prospect for reformation than one who perjures himself at trial in an unsuccessful effort to obtain acquittal.
>
> Sentencing, supra, 66 Yale L.J. at 217.

More importantly, a defendant has the right to testify in his own defense. As the court found, in Scott v. United States, supra:

> ... In [testifying in his own behalf, a defendant] risks the jury's disbelief. If he in fact fails to convince the jurors, conviction and punishment will follow. If the Government, for whatever reasons, concludes that prosecution for perjury is appropriate, he risks punishment for that as well. To allow the trial judge to impose still further punishment because he too disbelieves the defendant would needless discourage the accused from testifying in his own behalf.
>
> (Id., at 269).

If Mr. Hendrix was suspected of having committed perjury, there were procedures available for determining

whether he was guilty of such a crime and, if so, for punishing him. For the trial court to conclude Mr. Hendrix's guilt of perjury and impose an additional two-year sentence for that crime was unconstitutional and a clear abuse of the sentencing court's discretion.*

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*The judge's decision that Hendrix should be punished for his alleged perjury should be contrasted to the judge's permissive attitude toward possible falsification by government witnesses. On two occasions, when government witnesses testified in a manner contrary to the Government's theory of the case, the court allowed the prosecutor to confer with each witness off the record and then to recall him, at which time the witness compliantly retracted his earlier testimony and testified in a manner consistent with the Government's theory of the case (March 12, 1974:47-56, 116-22).

In the first instance, during the suppression hearing before trial, Police Officer McAndrews testified that the challenged statements had been made in response to questions directed at appellant Hendrix by McAndrews. The judge ruled that this constituted in-custody interrogation and that the statements were inadmissible because inadequate Miranda warnings had been given. Confronted with this ruling, Assistant United States Attorney Scotti spoke to McAndrews off the record and then recalled him to the witness stand, at which time the witness altered his earlier testimony, claiming now that Hendrix's statements were not given in response to questions but rather were volunteered spontaneously. If this revised testimony were credited, it would have rendered the statements admissible despite the inadequacy of Miranda warnings. The judge, by adhering to his earlier ruling that the statements were inadmissible, indicated that he disbelieved McAndrews' altered testimony. However, Judge Mishler did nothing further, not even to inquire about this possible misbehavior.

The second instance of altered testimony occurred during McAndrews' testimony at the trial itself. McAndrews testified that when Hendrix was arrested he was found to be in possession of a brown paper bag. During repeated questioning by the prosecutor, McAndrews insisted that the bag was brown. The court then directed a recess, during which the prosecutor talked to the witness concerning the color of the bag. When he returned to the witness stand after the

recess, the witness compliantly retracted his earlier "positive" testimony that the bag was brown, saying now that he remembered that the bag was indeed green (March 12, 1974:122). Here, too, the court said and did nothing, even out of the jury's presence. There was not even so much as an inquiry about the basis for this change in testimony. Contrasting this permissive attitude toward the Government to the two years' imprisonment imposed without due process on the defendant, the court demonstrated its uneven approach to the parties.

## II

**THE TRIAL JUDGE DEMONSTRATED HIS PREJUDICE AGAINST THE DEFENSE CASE AND IMPOSED AN UNFAIR BURDEN ON A DEFENSE WITNESS BY ORDERING HER TO PROVE WHAT SHE HAD ATTESTED TO.**

Novella Hendrix, the wife of the accused, testified as a defense witness at trial. Mrs. Hendrix explained that the approximately $3,000 found by the agents when they searched the Hendrix house was part of the money periodically sent to her by her brother to enable her to purchase goods in New York for him to sell in their store in Atlanta, Georgia (March 13, 1974:147-48). On cross-examination, the Assistant United States Attorney questioned Mrs. Hendrix at length concerning this money and her clothing purchases (March 13, 1974:160-67). At one point in this cross-examination the prosecutor asked Mrs. Hendrix for the names of the stores in which she had purchased clothing in the past:

> Q. You don't remember the name of any of these stores?
>
> A. No, but I can get them.
>
> Q. How can you get them?
>
> A. I have to call my brother.
>
> Q. Your brother has them?
>
> A. I send the bills to him.
>
> (March 13, 1974:167).

At this point the judge interrupted the cross-examination,

at first asking Mrs. Hendrix if she would like to call her brother and then, when Mrs. Hendrix explained that she believed the store was closed, directing her nonetheless to make the phone call (March 13, 1974:167-68). This direction was made in the presence of the jury.

It was clear to all present in the courtroom, including the jury, that the judge disbelieved Mrs. Hendrix's testimony and, in ordering her to telephone her brother, was seeking to discredit her. That this was what motivated the judge's directive was confirmed by his subsequent harrangue of Mrs. Hendrix out of the presence of the jury in which he essentially accused her of perjuring herself and, moreover, threatened to take similar steps to require her to confirm any future testimony (March 13, 1974:170).*

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* THE COURT: You are directed to call your brother and make sure you make calls to get him. I'm making a direction, you step down, you call him wherever he might be. You may step down and then I'll permit cross-examination.

THE WITNESS: I'll step down but I can't call him, the store is not open today, your Honor.

THE COURT: I think it's outrageous when a witness can say anything believing that the Government cannot -- doesn't have time to check it out.

[DEFENSE COUNSEL]: I would respectfully place my objection on the record that your Honor's inference --

THE COURT: She volunteered the information to the Jury that she could get the

information by calling her brother, that was her statement. She has the books but she didn't see it since the officers came in and made the search on the 22nd. Now these were gratuitous made for a specific purpose.

[DEFENSE COUNSEL]: I haven't coached my witness.

THE COURT: I don't say you did.

[DEFENSE COUNSEL]: Early this morning and late this afternoon --

THE COURT: When she indicates I could call my brother and get the information the answer is -- step down and call your brother. You made your objection on the record. That's the direction and if necessary you make the call for her it'll be at the Government's expense. Call her brother no matter where he is.

[DEFENSE COUNSEL]: I have to go over to the other office.

THE COURT: You have the privacy of my office. Let's not [waste] time. Gratuitous statements made to place the Government in a position where he cannot get the information. I think the answer to all that is that if you say you can corroborate it someplace, corroborate it. You have the time to do it now do it. Bring the Grand Jury up.

(Whereupon a recess was had.)

(After recess.)

THE COURT: Mrs. Hendrix, you are a witness under cross-examination, you are directed to answer the questions and nothing else. If you volunteer information as you have in the past, like I have the deed and I can tell you, I asked you to

in the judicial process. See, e.g., Bursten v. United States, 395 F.2d 976 (5th Cir. 1968). In this case, the trial judge, by admittedly seeking to discredit the testimony of a defense witness, abandoned this critical requisite of his position and instead became a member of the prosecutorial team. Worse, he employed powers not even available to a prosecutor in cross-examination by directing a defense witness to leave the stand and take certain steps to confirm or disprove her

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> go down and get the deed and the next was I would know the name of the stores but I have the book and the last one was Oh, I don't know the name but if I called my brother he would tell me. That is volunteering information. I'll direct you to go down and get the information. Do we understand each other?
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> THE COURT: This isn't asking the defendant to produce evidence to show his innocence.
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> [DEFENSE COUNSEL]: Requiring to produce evidence that is not available.
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> [THE PROSECUTOR]: The defendant volunteered.
>
> THE COURT: That's just the point, gratuitous information done for a particular purpose. She may not be a seasoned witness, she knows just what she's doing. Seat the jury.
>
> (March 13, 1974:168-70).

testimony. As this Court has repeatedly held:

> ... A trial judge conducting a case before a jury in the United States Courts is more than a mere "moderator" ... but he is decidedly not a "prosecuting attorney."
>
> United States v. Brandt, 196 F.2d 653, 655 (2d Cir. 1965).

See also United States v. Guertler, 147 F.2d 786 (2d Cir.), cert. denied, 325 U.S. 879 (1945); Hunter v. United States, 62 F.2d 217 (5th Cir. 1932).

More egregious, the court, by directing Mrs. Hendrix to confirm her testimony, telegraphed to the jury his disbelief in her testimony and, by extension, the testimony of her husband, the defendant, which she was corroborating. In so doing, the court improperly invaded the exclusive province of the jury to determine the credibility of the witnesses and the guilt or innocence of the defendant. Virtually every Circuit has repeatedly stressed that

> ... [i]t was for the jury to determine which of the witness's stories would be given credence, or indeed whether the witness would be believed at all. The comments of the trial judge clearly infringed upon the jury's credibility determining process and appellant was thereby deprived of a fair trial. See Bursten v. United States, [supra]; Moody v. United States, 5 Cir. 1967, 377 F.2d 175; Stevens v. United States, 5th Cir. 1962, 306 F.2d 834.
>
> United States v. Bates, 468 F.2d 1252, 1255 (5th Cir. 1972).

See also United States v. DeSisto, 289 F.2d 833 (2d Cir. 1961). The obligation of a trial judge to remain impartial is controlling, regardless of how much justification he feels for attacking a witness's credibility. Stevens v. United States, 306 F.2d 834, 838 (5th Cir. 1962).*

Given the court's invasion of the jury's credibility determining function at the trial below, the conviction should be reversed and the case remanded for a retrial at which the responsibility of determining the credibility of the defense witnesses can be left solely with the jury where it properly belongs.**

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*The judge's conclusory statements in his charge concerning the jury's role as finders of fact were woefully inadequate to cure his interference in the credibility determining process in this case. United States v. Bates, supra, 468 F.2d at 1255; Moody v. United States, supra, 377 F.2d at 179; United States v. DeSisto, supra.

**The court's bias in this matter is also apparent if one contrasts his efforts to impeach Mrs. Hendrix's testimony against his conduct regarding questionable testimony by government witnesses. As discussed previously (see fn. at 20-21, supra), on two occasions during the presentation of the Government's case, when government witnesses testified contrary to the Government's theory of the case, the court declared a recess which the prosecutor took advantage of to speak privately with the witness. When the proceedings resumed, the witness was returned to the stand, where he compliantly retracted his earlier testimony and then testified in a manner consistent with the Government's theory of the case. On neither of those occasions did the court even question the sudden and surprising change in testimony, not to say direct the witness to prove his testimony, or threaten the witness, or imply that he had committed perjury, as the court did with Mrs. Hendrix.

## CONCLUSION

For the foregoing reasons the judgment of the District Court should be reversed and re-sentencing or a new trial ordered.

Respectfully submitted,

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Certificate of Service

6/26, 1974

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Eastern District of New York.

Michael A. [illegible]